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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 830

THE SEMINOLE NATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 31, 1941.

CERTIORARI GRANTED FEBRUARY 16, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. L-208

THE SEMINOLE NATION,

vs.

THE UNITED STATES.

I. HISTORY OF PROCEEDINGS

The Original petition was filed May 31, 1930.

On December 27, 1937, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition which is as follows:

II. AMENDED PETITION

(Original Petition Filed May 31st, 1930.)

(Amended Petition Filed December 27, 1937.)

To the Honorable, the Court of Claims:

The plaintiff, the Seminole Nation, respectfully represents:

I

That by a certain act of Congress, approved May 20, 1924 (43 Stat. 133, as modified by Joint Resolution approved May 19, 1926, 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the time for filing suits until June 30, 1930, and by a certain act of Congress, approved August [fol. 2] 16, 1937, Public No. 296, 75th Congress, 1st Session, Chapter 651, permitting amended petitions to be filed prior to January 1, 1938), plaintiff was authorized and empowered to bring and maintain this action.

II

That all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner in fee of a large tract of land situated in what is now the State of Oklahoma, and of large sums of money held in trust for it by the United States under various treaty provisions.

III

That the defendant, acting in its capacity of guardian of said Seminole Nation, on March 21, 1866, entered into a treaty with plaintiff (14 Stat. 755), Article 3 of which treaty provides in part as follows:

"Article 3. * * * The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands [fol. 3] according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written."

IV

That by the terms of said Article 3 the said Seminole Nation purchased said 200,000 acres of land in fee simple, which said lands thereafter constituted its National Domain; that under said treaty it became the duty of the United States to cause the boundary lines of said lands to be accurately surveyed and established.

V

That in 1866, the Seminoles were removed to and placed upon lands, which were then believed by the officers of defendant to be the new National Domain purchased by [fol. 4] said Seminole Nation in said treaty of March 21, 1866.

VI

That in 1871, pursuant to its said treaty duty, the United States delegated one Frederick W. Bardwell to survey and establish said Creek dividing line, which was to become the eastern boundary line of said Seminole National Domain under Article 3 of said Treaty of March 21, 1866. Said Creek dividing line, as run by said Bardwell, thereafter known as the Bardwell line, was approved by the Secretary of the Interior in 1872.

VII

That by the Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, it was provided in Article I thereof that:

"It being the intention of the Government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location [fol. 5] shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie Nation."

VIII

That said Pottawatomie Indians, having selected lands immediately west of and adjoining the said Seminole National Domain, on November 9th, 1870, the Secretary of the Interior, by order, set aside said lands for the Pottawatomies, and said Indians were removed thereto in 1872.

IX

That because of an erroneous survey of the said Seminole National Domain, made by one Nathaniel Robbins in

1871, and approved by the Secretary of the Interior on February 5, 1872, 11,550.54 acres of the 200,000-acre tract so acquired by said Seminole Nation under Article 3 of said Treaty of March 21, 1866, was excluded from said Seminole National Domain and included in said Pottawatomie Reservation.

[fol. 6]

X

That by an agreement between the United States and the Pottawatomies, ratified in the Act of March 3, 1891, 26 Stat. 989, 1016, the Pottawatomie Indians ceded to the United States the tract assigned to them under their Treaty of 1867. In said agreement the United States stipulated that it would make and confirm allotments in severalty to said Pottawatomie Indians out of lands within their cession; and the ratifying act further provided that the remaining lands be opened to settlement as public lands and sold to white settlers at a stated price per acre under the homestead laws, and the proceeds thereof was to be turned into the treasury as public money.

XI

That under said Act of March 3, 1891, said 11,550.54 acres belonging to said Seminole Nation, were erroneously treated as a part of said Pottawatomie Reservation, and were either allotted to Pottawatomie Indians, or disposed of to white settlers under said homestead laws.

XII

That defendant has known, or has had good reason to know, that said errors existed for many years; that as guardian of plaintiff, the defendant was under a plain duty to rectify said errors by putting plaintiff in possession of [fol. 7] its said 11,550.54 acres of land so erroneously disposed of; that well knowing that plaintiff had no means of recovering said land except through the action of defendant, and notwithstanding its said plain duty, the defendant has refused and neglected, and still refuses and neglects to cancel said erroneous disposals, or to redress the plaintiff for the loss of its said lands.

XIII

That although having full knowledge of the facts and circumstances, yet defendant has permitted said erroneous

disposals to stand, thus confirming said disposals by retaining all the benefits it has received from them; therefore, the defendant, in violation of the rights of plaintiff, has appropriated said lands in circumstances which involved an undertaking by it to make just compensation to plaintiff for said lands so taken, under the Fifth Amendment to the Constitution of the United States.

Wherefore, the premises considered, the plaintiff, said Seminole Nation, prays for judgment against the defendant for the value of said 11,550.54 acres of its said National Domain thus taken by defendant, with such addition thereto as may be required to produce the present full equivalent of the value paid contemporaneously with said taking, which is interest on said values at 5 per centum per annum from [fol. 8] the dates of said erroneous disposals to date of judgment, and that plaintiff may have such other and further relief as to the Court may seem just and proper.

The Seminole Nation, By Paul M. Niebell, Its Attorney of Record.

Of Counsel: W. W. Pryor, (E. J. Van Court, Deceased).

Duly sworn to by Paul M. Niebell, jurat omitted in printing.

[fols. 9-10] III. General Traverse—Filed Feb. 14, 1938

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Carl McFarland, Assistant Attorney General.

IV. Argument and Submission of Case

On April 10, 1941, the case was argued and submitted on merits by Mr. Paul M. Niebell for plaintiff, and by Mr. Wilfred Hearn for defendant.

[fol. 11] **V. Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.**—Filed May 5, 1941

Mr. Paul M. Niebell for the plaintiff. *Messrs. W. W. Pryor* and *C. Maurice Weidemeyer* were on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff's claim is asserted in its amended petition filed herein on December 27, 1937, pursuant to the authority granted by acts of Congress of August 16, 1937 (c. 651, 50 Stat. Part I, 650); February 19, 1929 (45 Stat. 1229); May 19, 1926 (c. 341, 44 Stat. 568); and May 20, 1924 (c. 181, 43 Stat. 133).

2. By the treaty of March 21, 1866 (14 Stat. 755) the United States granted to the plaintiff 200,000 acres of land immediately west of the eastern portion of the Creek lands. Article III of said treaty provides in part as follows:

• • • The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to wit: Beginning on the Canadian river where [fol. 12] the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866 [June 14, 1866], following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the

sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. * * *

3. In the fall of 1866 the Seminoles were removed by the United States to what was believed to be their new national domain, and thereafter occupied said lands and made improvements thereon. At this time the boundaries of said domain had not been established.

In 1871 the line dividing the eastern and western parts of the Creek domain was run by Frederick W. Bardwell, and was approved by the Secretary of the Interior on February 5, 1872. This line became the eastern boundary of the Seminole national domain, as provided for in the Seminole treaty of March 21, 1866.

Shortly thereafter, within about two months, Nathaniel Robbins was employed by the defendant to run the western line of the plaintiff's domain so as to include the 200,000 acres which the defendant had granted to plaintiff. This survey was completed in 1871 and was approved by the Secretary of the Interior February 5, 1872. According to Robbins' calculations, the number of acres included between the Canadian River on the south, the North Fork of the Canadian River on the north, the Bardwell line on the east, and the Robbins' line on the west, was 200,000.00 acres.

4. The defendant granted to the Pottawatomie Indians of Kansas a certain tract of land immediately west of the plaintiff's domain, and subsequently allotted and patented said lands to said Indians in severalty, or sold and patented them to settlers thereon and turned the purchase price [fol. 13] thereof into the Treasury as public money. Thereafter said lands have been held by the grantees adversely to the plaintiff.

It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others.

5. After the Bardwell line separating the eastern from the western half of the original Creek domain had been run, it was discovered that the plaintiff had been located on a

large part of the Creek domain east of the Bardwell dividing line, which lands had been reserved by the Creek Nation. In order to remedy this situation, the defendant purchased from the Creek Nation 175,000 acres of its domain immediately east of the Bardwell dividing line and between the Canadian River on the south and the North Fork of the Canadian River on the north, and this 175,000 acres, more or less, was added gratuitously to the original Seminole reservation of 200,000 acres, more or less. This acreage was added to the Seminole domain at the expense of the defendant and without cost to the plaintiff.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover the value of an alleged deficit in the number of acres the defendant agreed to set apart for it as a reservation. By the treaty of 1866 the United States acquired from the Creek Nation the westerly half of their lands; and it granted to the plaintiff 200,000 acres of these lands immediately west of the lands retained by the Creeks and between the Canadian River on the south and the North Fork of the Canadian River on the north. However, when the defendant undertook to settle the plaintiff on their said [fol. 14] reservation, by accident it settled them instead on a part of the lands retained by the Creeks. When this error was discovered, the defendant purchased from the Creek Nation at its own expense and without cost to plaintiff 175,000 additional acres immediately east of plaintiff's original reservation and added this to the original reservation of 200,000 acres.

When the defendant came to survey and fix the boundaries of the original reservation of 200,000 acres, it is alleged that it included therein only 188,449.46 acres, and it later gave to another tribe the remainder of 11,550.54 acres. The plaintiff sues to recover the value of this deficit.

Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000-acre tract the defend-

ant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least 360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000-acre tract agreed to be set apart to it.

Moreover, under the act of August 12, 1935 (49 Stat. 571, 596), the defendant is entitled to an offset of "all sums expended gratuitously by the United States for the benefit of the said tribe or band." Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000-acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been.

Plaintiff's petition will be dismissed. It is so ordered.

JONES, *Judge*, and LITTLETON, *Judge*, concur.
WHALEY, *Chief Justice*, dissents.

CONCURRING OPINION

MADDEN, *Judge*, concurring:

I concur in the result arrived at by the Court, because of the provision of the Act of August 12, 1935.

When the defendant settled the Seminoles on the wrong land, and they made their improvements there, there was an obligation on the defendant to repair its mistake. How-
[fols. 15-16] ever, the purchase of the 175,000 acres from the Creeks, and its addition, without further consideration, to plaintiff's reservation, comprised a considerable element of gratuity, in addition to this element of reparation. That gratuity would, as is said in the Court's opinion, more than offset the money claim here asserted for the loss of some 11,000 acres, if that loss actually occurred.

[fols. 17-18] VI. JUDGMENT OF THE COURT—May 5, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

VII. Proceedings After Judgment

On July 9, 1941, the plaintiff filed a motion for an extension of time to July 11, 1941, within which to file a motion for a new trial, and said motion was allowed July 9, 1941, by the court.

On July 10, 1941, the plaintiff filed a motion for a new trial.

On October 6, 1941, the court entered the following order on said motion:

Order

It is Ordered this 6th day of October, 1941, that the plaintiff's motion for new trial be and the same is hereby overruled.

On November 19, 1941, the plaintiff filed a request for record in re certiorari under Rule 99 (a) and 99 (b).

[fols. 19-20] Order Settling Record

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above styled case, and the parties having requested and agreed that the portions of the evidence attached hereto be included in the record to be certified to the Supreme Court, and the Court having found such portions to be accurate transcripts of portions of the original record material to the errors assigned, the same are this December 10, 1941, settled and approved as portions of the evidence to be included in the record to be certified to the Supreme Court.

By the Court:

Richard S. Whaley, Chief Justice.

[fol. 21] IX. Portions of the Record Agreed to by Parties as Material to Errors Assigned—Filed December 8, 1941

[fol. 22] Extracts from the Report of Arthur D. Kidder, District Cadastral Engineer of the General Land Office, to the Commissioner of the General Land Office, Dated March 18, 1941

The following report is submitted in response to office instructions dated January 14, 1941 (1810212-"E") in

which a field examination was required with respect to the location of the "Creek Dividing Line", and the lines of certain later surveys that were related thereto.

The investigation was ordered on the request of the Department of Justice in letter dated January 3, 1941, for the bearing of such facts as can now be ascertained by thorough search on the ground, and the value of such evidence in the case of The Seminole Nation v. The United States, No. L-208, United States Court of Claims.

The field work was begun on January 22, 1941, and was completed on February 28, 1941. Three surveying parties of the General Land Office engaged in the work, headed by cadastral engineers who have had a broad experience in land surveying practice.

The areas that are involved in the suit are situated in Seminole County, in the State of Oklahoma. That portion of the Creek Dividing Line which is in question is about thirty-five miles in length, extending from the Canadian River northward to the north fork of that stream. By the provisions of early treaties the area that lies on the east of the boundary was a part of the diminished Creek Indian Lands; on the west, the Seminole Indian lands. Through later treaties and surveys the Seminole Indian Nation acquired the title to the lands lying on the east.

There is no present interest in the boundary excepting as to the question of its location as this may be indicated by the marks on the ground and by the field-note record of the survey thereof, executed by Frederick W. Bardwell, who was engaged for the purpose, and who ran the line between the dates of August 16 and 22, 1871. These field [fol. 23] notes are now filed in the National Archives. The field notes were approved on February 5, 1872, by the Secretary of the Interior.

The Seminole 200,000-acre Tract

In 1871, shortly after the survey of the Creek Dividing Line by Bardwell, the survey of the north and west lines of the Seminole tract, intended to embrace 200,000 acres, was made by Nathaniel Robbins, on the authority of the Commissioner of Indian Affairs; this survey was approved February 5, 1872, by the Secretary of the Interior.

In the Robbins survey, the south bank of the North Fork of the Canadian River was meandered upstream, running

to the point for the northwest corner of the tract; thence a line was run south to the Canadian River, to the southwest corner. The meander courses of the Canadian River are contained in the Bardwell field notes.

The questions with respect to the Robbins survey are (1) whether the beginning point of the meander courses agreed with the location of the Creek Dividing Line; and, (2) as to the true area of the tract included within the boundaries as surveyed.

It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.

There are several factors that contribute to the discrepancy in area: (1) the beginning point was east of the dividing line; (2) the Robbins meander courses are not correct as to their direction from true north; and, (3) the length of the Bardwell east boundary, from north [fol. 24] to south, is very much less than the distance that is given in the field notes. These factors are of as much consequence as that of the conflict, if so regarded, with respect to the survey of the 175,000-acre tract. The field examination has not sustained the certainty of an actual overlap in the surveys, excepting by reliance on the Bardwell record without regard to the Hackbusch retracement.

The total wasting in the meander courses along the north fork is recorded in the Robbins field notes (p. 888, General Land Office copy) as being 708.02 chains; this is 8 miles 68.02 chains. The northwest corner, on the river bank, was identified in 1895 in the subdivisional survey of T. 11 N., R. 5 E. When the distance of 8 miles 68.02 chains is tested by transfer from west to east through the township boundary lines, the point on the river in sec. 25, T. 11 N., R. 6 E., is 8.45 chains (558 feet) to the west of the east boundary of the township. This is 17.50 chains (1155 feet) east of the Creek Dividing Line as the location of that line is indicated by the Bardwell field-note record. It is 21.30 chains (1406 feet) east of the dividing line as the location was determined according to the marks of the line, as identified by the Hackbusch retracement (1888), and described in the field notes.

The meander courses in sec. 25, T. 11 N., R. 6 E., have been (1941) carefully run. There has been no appreciable

change in the bank since 1895, or since 1871 as nearly as the meander courses can be compared. This test places the Robbins point of beginning even more to the east, or not over 2.50 chains (165 feet) to the west of the east boundary of the township. There appears to be nothing to support the latter position, excepting that it conforms with the location of the nearest marks of the Rankin west boundary (1868, unapproved) that were found in secs. 24 and 25, T. 9 N., R. 6 E.

[fol. 25] The Robbins field notes indicate that the meander courses were run on a magnetic variation of 10°00′ E. (p. 805, General Land Office copy). The magnetic variation in 1895 as taken from the township plat was 8°45′ E.; the correction to 1871, to be added, is 1°06′ (U. S. Coast and Geodetic Survey, Serial 592, 1936, p. 17). Thus the actual magnetic variation in 1871, at the Robbins point of beginning was approximately 9°51′ E.; accordingly, the Robbins meander courses, in order to orient to the true meridian, require a correction of 0°09′, to be added to NE. and SW. courses; subtracted from NW. and SE. courses, as recorded. However; the plotting of the Robbins meander courses, when compared with those of the subdivisional survey of Tps. 11 N., Rs. 5 and 6 E., show a discrepancy of approximately 2°45′ in orientation. This is illustrated on the diagram that was prepared in the General Land Office (see defendant's brief, p. 139). The effect of this discrepancy was to indicate a greater calculated area for the Robbins tract that was actually included within the boundaries. The area of the strip that lies between the Robbins meander courses, as plotted from the field notes, and the meander line that is along the actual course of the river is approximately 1100 acres.

The strip of land of the Robbins tract, running from north to south, and that lies to the east of the Bardwell boundary, as that location is indicated by the field-note record (disregarding the Hackbusch retracement) contains approximately 3700 acres. The area of the *additional* strip that lies to the east of the boundary as found by the Hackbusch retracement is 4632 acres.

The actual length of the east boundary of the 200,000-acre tract, between the rivers, when measured along the location that is indicated by the Bardwell field-note record, is 30.35 chains (2003 feet) less than the Bardwell record

distance; by the Hackbusch retracement it is 28.95 chains [fol. 26] (1911 feet) less than the Bardwell record distance.

The actual length of the west boundary of the 200,000-acre tract, between the rivers, as taken from the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.

As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground; this subject will be continued after showing the Hackbusch retracement.

The Hackbusch Retracement

* * * * * * *

The Hackbusch location (1888) has been recovered for the whole distance from the Canadian River to the North Fork of the Canadian River. From this line, as found by the marks, accurate connections to the subdivisional surveys have been made in a number of places, by which to draw the line of the township plats.

The Hackbusch line is found to be marked through the older timber by the blazing on the trees. These marks are now completely overgrown; they have been identified in considerable number by testing with an increment borer, and by occasional blocks that have been removed as samples.

The Hackbusch field-note record stream-crossings in the true-line position at Salt Creek, Little River, and both branches of Wewoka Creek are found to be accurate.

* * * * * * *

The true-line location, as indicated by the marks on the trees, differs only slightly from the position that is shown [fol. 27] by the field-note record. The field notes and the line on the ground are in substantial agreement, and are regarded as an entirely acceptable survey. The accuracy is far above the average of the land-surveying practice of that date. It is of even greater importance to state that through the marks that have been identified, and the accurate measurements, the work was faithfully executed, and the field note record may be relied upon.

There are three points of control for the Hackbusch location that relate directly to the field-note record by Bardwell, 1871. These are the initial point on the Canadian River; the 4th mile station; and the 38th mile station. The latter is located on the boundary at a point that is about three miles north of the North Fork of the Canadian River. No other marks of the Bardwell survey were found by Hackbusch, excepting the 40th mile station, which was identified and used to verify the 38th.

* * * * * * * *

The Application of Surveying Rules

The rules for the restoration of lost or obliterated corners have their origin in the principle that a survey which was faithfully made can be restored or reconstructed by adhering closely to the marks of that survey, and by following the method and order of procedure by which it was first laid out. In the absence of marks, and upon the demonstration of gross error or fraud, it is not to be presumed that a survey can be reconstructed, but rather that a retracement and resurvey can be made, to be based upon the best available evidence of the original lines and marks, such as will supply the data with respect to the facts and afford the needed protection of the property rights whose locations have been derived from the original record.

These rules and principles are of long standing. It has [fol. 28] been shown that the rules were given full weight at the time of the retracement, in 1888, when it became evident that the Bardwell survey of the Creek Dividing Line, in 1871, had not been faithfully executed, that it was grossly erroneous, and that few marks had been made for its perpetuation. The field examination of 1941 has served to confirm the present complete absence of original Bardwell marks through the Seminole lands.

The Hackbusch field-note record (1888) supplies the identification of the initial point on the Canadian River, and of the 4th and 38th mile stations. The sufficiency of that evidence and the question of its authentic character were given careful consideration by Hackbusch, by Martin who examined the survey, and by the Commission of the General Land Office on the review of these questions prior to the approval of the Hackbusch retracement.

It is found additionally in the 1941 field examination that the placing of the boundary along the line of this control

was strictly in accord with approved surveying practice; the position of the boundary, as thus restored, in its relation to the official subdivisional surveys, has been ascertained.

The plaintiff in this case alleges a gross shortage in the Robbins survey of the Seminole 200,000-acre tract, and relies on the location of the Creek Dividing Line as determined by the Hackbusch retracement. The defendant contends that the boundary should be restored strictly by reference to the Bardwell field-note record, disregarding the retracement, and that the Hackbusch survey of the 175,000-acre tract overlaps the Robbins survey, thereby accounting for part of the shortage. The report herewith is factual with full regard to both contentions.

The principles that are involved in the opposing views are of utmost importance when applied to the very broad prob- [fol. 29] lem of the *maintenance* of all very old surveys where obliteration of marks becomes advanced. The subject may be resolved into the question of the acceptability, as evidence, of the perpetuation of marks through reliable data of later surveys that relate back to the original record.

The areas included within the boundaries as surveyed.

The *areas* of the Seminole lands are shown in the following tabulation. . . .

. . . . . .

Hackbusch Areas:	189,648.18
Shortage:	10,351.82
	200,000.00

There is a shortage of 9,152.83 acres in the intended 375,000.00 acre total area of the Seminole lands.

If the plaintiff's point of view should be sustained, there will be a resulting shortage of 10,351.82 acres in the Robbins survey of the 200,000-acre tract; an excess of 1,198.99 acres in the Hackbusch survey of the 175,000-acre tract.

. . . . . .

The party chiefs on this field examination were Jos. C. Thoma, Geo. W. Johnson, and Norville E. Shearer, cadastral engineers of the General Land Office; five experienced principal assistants took part in the work, and all deserve

much credit for their keenness in the search for marks on the forest trees. The undersigned joined in the direction of the field operations and the daily consultations.

Very respectfully, (Signed) Arthur D. Kidder District Cadastral Engineer.

[fol. 30] LETTER OF JOHN CHUPCO, CHIEF OF THE SEMINOLE NATION, AND FUS HATCHEE, SECOND CHIEF, TO THE COMMISSIONER OF INDIAN AFFAIRS, DATED MARCH 12, 1872

Seminole Agency, Mch 12th 1872.

To the Hon. Commissioner, Indian Affairs, Washington, D. C., Through the Seminole Agency

SIR:

We have the honor to address you upon what is a very important subject to us. Owing to the many rumors passing around in this country the Seminole people are feeling no little anxiety about their homes. When the Treaty of 1866 was made we were promised that our country would be surveyed that fall. We arrived here during the fall and winter of 1866. No survey having been made our Agent instructed us where to locate and we did as directed. Superintendent Byers visited us during February of 1867 told us that we were now at our home and to make all the improvement we could. Col. Wortham the next encumbent visited us in December 1867 and while here gave us every assurance we could ask that we would be by the Department of Ind. Affs protected in whatever improvement we would make. In the Spring of 1868 a survey of this country was made and we were shown our boundary lines and the majority of the Seminoles who had located outside of our boundaries left their places and moved within our lines taking and improving the places where they now live. Our friends the Creeks former owners of this country complained of the survey saying it was unjust and incorrect as it threw the dividing line of the Creek Nation too far East. As this complaint if true was of momentous interest to us we asked Superintendent L. M. Robinson who next visited us. He told us that the survey was made probably right and for us to go on and make all the advancement we could.
[fol. 31] That in any event we would not be interfered

with. That we could consider this our own home and that we would not be moved from here. We are informed by our delegates who attended and represented us at the General Council of Dec. 1870 that Col. E. S. Parker then Com. Ind. Affairs told them that no survey of this country had as yet been approved by the Department and to tell the Seminoles not to be in any way alarmed for in the event of the first survey being wrong the Seminoles should not be interfered with, that if this country should prove to belong to the Creeks they would be given other unoccupied land instead thereof, and said the Creeks have already agreed to this. We have made such improvements as we could expending all that the Government has given us as well as what we may have had of our own for we have been assured by everyone that we have asked authorized as we thought to speak for the Government, of substantially the same thing, viz., that we should not be interfered with, and we have diligently sought information from every source. Our farms that we have made would not compare favorably with those of white men in the states we know still they are very important to us. As we gain our food and shelter from them and common as they may be they are all important to us. Many of our people are old and infirm unable if deprived of their present to make new homes. The Seminoles during the years of their civilization have been continually moved about from place until we are heartily tired of moving, and if moved from here after the repeated assurances we have had of security and protection we fear many would become discouraged and lo-the to begin anew. We are informed by the Creeks that according to the new survey by virtue of late written documents from the Department they are now in possession of their entire country of which this is a part and that we the Seminoles can only remain here by becoming subject to their laws a condition of things we are in no wise willing to agree to. We respectfully call your attention to an enclosed letter marked "A" [fol. 32] which we received from No cas yarholor who is Judge of the nearest adjacent District of the Creek Nation. We have answered this letter or the latter part of it by informing him that we did not locate here in this part of the country of our own accord but in compliance with instructions from our Agent and that until we should receive direct information from the proper authority of the U. S.

we would continue to enforce our own laws over this country. We would respectfully ask an answer to this so that we may know what we are doing.

Very Respectfully, Your Obedient Servants John Chupco, Chief Fus Hatchee, 2nd Chief.

LETTER FROM JOHN F. BROWN, CHIEF OF THE SEMINOLE NATION, TO THE COMMISSIONER OF INDIAN AFFAIRS, WASHINGTON, D. C., DATED JANUARY 17, 1900

Washington, D. C., January 17th, 1900.

Hon. W. A. Jones, Commissioner of Indian Affairs.

DEAR SIR:

By Article III of the treaty of 1866, (14 Stat. 756) the United States ceded and agreed to convey to the Seminole Nation two hundred thousand acres of land.

By an agreement made in pursuance of the Act of 1873, (17 Stat. 626) which agreement bears date February 14, 1881, and is now on file in the Department of the Interior, the United States purchased from the Creek Nation one hundred and seventy-five thousand acres, for which they paid the sum of $175,000, as shown by the Act of August 5, 1882. (22 Stat. 265.) Thus making three hundred and seventy-five thousand acres purchased from the Creek Nation for the Seminoles, and upon which they had built [fol. 33] their homes. These lands were purchased in two tracts, as will be observed, and were to be surveyed and set apart by the United States, to the Seminole Nation. By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only $365,864.43 acres, leaving a deficit of 9,135.57 acres, which amount I now respectfully ask the Department to set apart to the Seminole Nation, at as early a date as may be practicable, in order that the same may be included in the Seminole allotments, for which they are now ready.

Very respectfully yours, (Signed) John F. Brown, Chf Seml Nation.

EXTRACT FROM LETTER FROM THE OFFICE OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, TO THE SECRETARY OF THE INTERIOR, DATED FEBRUARY 6, 1900

Feb. 5, 1900.

The Honorable The Secretary of the Interior.

SIR:

This office is in receipt of a communication from John F. Brown, Chief of the Seminole Nation, dated January 17, 1900, in which he refers to the treaty of 1866 with the Seminole Nation and the agreement made with the Creeks February 14, 1881, whereby 375,000 acres were purchased from the Creek Nation for the Seminoles, and states that by an error made by the United States surveyors in establishing the boundary of the tracts, there was as a matter of fact set apart to the Seminole Nation only 365,864.43 acres, leaving a deficiency of 9,135.57 acres, which amount he asks the Department to set apart to the Seminole Nation at as early [fol. 34] a date as may be practicable, in order that the same may be included in the Seminole allotments, for which they are now ready.

. . . . . .

No provision was made for the survey of the lines, nor was payment required to be made by the Seminoles for said additional lands, either in money, or by a cession of lands in the west. The Creeks were paid $175,000, as provided for in the agreement. It is not found that the Seminoles have ever paid any consideration for the additional 175,000 acres.

The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown.

. . . . . .

(Signed) W. A. Jones, Commissioner.

EXTRACT FROM LETTER FROM F. L. CAMPBELL, ACTING SECRETARY OF THE INTERIOR, TO THE COMMISSION TO THE FIVE CIVILIZED TRIBES, MUSCOGEE, I. T., DATED OCTOBER 16, 1900

* * * * * * *

August 24, 1900, you were advised that an examination of the plats and field notes of the various surveys and a compilation of the areas of the "Creek purchase" would have to be made to demonstrate if the error alleged by the Seminole Nation was in the tract granted to the Seminoles in accordance with the treaty of March 21, 1866 (14 Stat., 756).

* * * * * * *

The Department is now in receipt of a letter of October 10, 1900, from the Commissioner of the General Land Office, reporting upon its letter of August 24, 1900, in which he was directed to make an examination of the records of his office, and particularly of the returns of recent surveys of the Seminole Nation, an accurate computation to be made of the quantity of land within the boundaries as located by the surveys heretofore made of the tract purchased from the Creek Nation for the Seminoles, and to report the facts [fol. 35] to the Department.

He states that the area of the Seminole lands between the meander lines north or left bank of the Canadian river, the meander lines south or right bank of the north fork of the Canadian river, and the meridional east and west boundaries of the tract, is 365,853.18 acres; that the water surface of both streams to the middle thereof is approximately 2,730.80 acres, making a total of 368,583.98 acres; that on one of the township plats a broken line is drawn in the middle of the stream to represent the boundary between the Creek and Seminole lands where the lines of both nations have the north fork of the Canadian river for a common boundary; that if the *middle* threads of the streams are regarded as the boundaries the area is as last stated; otherwise the meander line must govern and the area is that first written; that as to the contention of the Seminoles that the east boundary of the 175,000-acre purchase is incorrectly located, it may be said that said east boundary was carefully and properly surveyed in 1888 to add 175,000 acres of land east of the "dividing line" and extending to

the meander line only of the stream forming its north and south boundaries; that it cannot be determined from the new survey exactly how much land is east of the "dividing line" because no direct connection was made therewith, but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the "crooked west boundary" of the 200,000 acres west of the "dividing line," or in the incorrect location of the "dividing line" itself; * * *

* * * * * * * *

It is apparent, therefore, that whatever deficit may exist it is not in the tract ceded in 1881, 175,000 acres, and therefore the Seminoles are not entitled to have any other lands segregated for them, from the Creek Nation.

* * * * * * *

[fol. 36] EXTRACTS FROM FIELD NOTES OF FREDERICK W. BARDWELL

(Defendant's Exhibit "C")

The line of division then, lies at the distance of 20 miles and 64.43/100 chains Eastward of the Meridian of the mouth of Pond Creek.

A point on the bank of the Canadian River, 14 chains and 65 links East of Station 525 of that survey, and East of Pond Creek 1858 chains and 16 links was used for the purpose of determining the initial point of the dividing line.

The distance of this point from the required line of division is 193 chains and 73 links measured on a line due West. The initial point of the dividing line was found by measuring distances along the bank of the Canadian, until the sum of the Westings computed from those distances and their bearings was sufficient to equal the whole amount of Westing required.

From the point thus found the survey proceeded as indicated on the following page.

This initial point was marked by a cedar post placed firmly in the ground and having the word Creek cut on its Eastern face, and the word Seminole cut on its Western face.

Field Notes of Survey of the Division line between the Creek and Seminole Nations, and between the Creek Nation and the United States, dividing the original Creek Country into two equal parts commencing at a point near station 534 in the Survey of the Canadian River and 20 miles and 64.43/100 chains due East of the Meridian of the mouth of Pond Creek.

At this point the bank is above high water, and the post marking the point is placed quite close to the bank. Aug. 16th. 1871

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[fol. 37] I certify that the foregoing record is a true and faithful statement of the survey of that portion of the former Creek boundary, situated on the North Fork of the Canadian River, also of the computation used to determine the position of the line dividing the former Creek country into two equal portions, also the survey of the dividing line itself, extending from a point on the Canadian River, due North to the Cherokee Boundary in latitude 36° 8′ 42″ a distance of 85 miles and 156 feet.

I also certify that the work has been executed according to the instructions received from the Indian Office.

Frederic W. Bardwell.

STATE OF KANSAS,
Douglas County, ss:

Frederick W. Bardwell being first duly sworn deposes and says that the matters and things contained in the foregoing certificate are true.

Frederic W. Bardwell.

Sworn to and subscribed before me the 4th day of January A. D. 1872. John G. A. Norton, Notary Public.

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STATE OF KANSAS,
Douglas County, ss:

On this day of September A. D. 1871, personally appeared before me a Notary Public in and for said County and State. John F. Smith, Gilbert Plank, William Patridge, I. P. Devine, J. F. Ewing, P. C. Bailey and James P. Cassedy, who being first duly sworn according to law depose and say that they assisted F. W. Bardwell Civil and

Topographical Engineers in Surveying the boundary of the Creek Country, that lies along the North Fork of the Canadian River. And afterwards assisted in surveying the line of Division of the Creek Country into two equal parts. And according to the best of our knowledge and belief the surveying was in all respects faithfully and carefully executed.

[fol. 38] John F. Smith, ax man; Gilbert Plank, Flagman; J. P. Divine, Chain-man; John F. Ewing, Ax man; P. A. Bailey, Chainman; Jas. P. Cassedy, 1st Flagman; Wm. Partridge, Clagman.

Sworn to and Subscribed before me this 26th day of September A. D. 1871. John N. Norton, Notary Public.

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COPY

Department of the Interior
Washington, D. C.

February 5th 1872.

SIR:

I have received your letter of the 2nd inst. submitting field notes of the survey of the Western boundary of the Creek Country and agreeably to your recommendation they are approved and herewith returned.

Very Respectfully, Your Obedient Tenant (s.) C. Delano, Secretary.

Hon. F. A. Walker, Commissioner of Indian Affairs.

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[fol. 39] EXTRACTS FROM FIELD NOTES OF NATHANIEL ROBBINS

(Defendant's Exhibit "A")

Survey of a part of the North and West Lines of Seminole Reservation commenced October 23rd 1871 at a post in mound on South Bank of North Fork in Line of Division of Creek Lands.

On the Meandering of North Fork the Column marked "Bearing" contains the true Bearing, the variation of needle being 10° East. The Distance is expressed in Chains and hundredths of a chain.

Double Distances Northings. Southings Eastings and Westings are expressed in Chains and fractions of chains with decimal carried to four places.

Double Areas are expressed in Square Chains and fractions with decimals carried to three places.

Page 1

Meandering of North Fork Commenced Oct. 25th 1871

Station	True Bearing	Distance	Northing	Southing	Easting	Westing	Double Distance	Double Areas
No. 1	N. 53 W.	34.90	21.0033			27.8724	+21.0033	+585.412
2	S. 84 W.	6.82		0.7128		6.7826	+41.2938	+280.079
3	S. 57 W.	7.33		3.9922		6.1474	+36.5888	+224.926
4	S. 69 W.	9.81		3.5156		9.1584	+29.0810	+264.807
5	S. 15 W.	29.50		28.4948		7.6352	− 2.9294	− 22.366
6	S. 75 W.	9.87		2.5545		9.5336	−33.9787	−323.939

* * * * * * * * *

Page 2 and 3

[fol. 40]

* * * * * * * * *

Total Westing of Meandering line in Chains	708.0201	
Distance from 35th parallel North to first Station in Meandering course in Chains Per Bardwell's Survey	2,256.61	
Area of Parallelogram between Base line of Meandering of North Fork and 35th Parallel in Acres		159,773.209
Area between 35th parallel and Meandering of Canadian River as per Bardwell's Survey in Acres		37,429.497
Total Area Seminole Reservation		200,000.003

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STATE OF KANSAS,
Douglas County:

On this 28th day of November A. D. 1871 Personally appeared before me a Notary Public in and for said County & State John F. Smith, Gilbert Plank, John F. Ewing, Charles Lamb and William Partridge, who being first duly sworn according to Law depose and say that they assisted Nathaniel Robbins Civil & Topographical Engineer, in surveying the North & West Boundaries of the Reservation of the Seminole Indians in the Indian Territory, and according to the best of their knowledge and belief the said surveying was in all respects faithfully correctly and carefully executed.

John F. Smith, Chairman; Gilbert Plank; John T. Ewing; Wm. Partridge.

Sworn to and subscribed before me this 28th day of November A. D. 1871. John G. A. Norton, Notary Public.

[fol. 41] Washington, March 26, 1940.

Re *Seminole Nation* v. *United States*, No. L-208

Court of Claims

The Honorable, The Attorney General.

My Dear Mr. Attorney General:

I have received your letter dated February 23 (90-2-20-53) signed by Norman M. Littell, Assistant Attorney General, relative to the above-styled case and requesting a supplemental report setting forth all facts which appear to be pertinent to the issues involved. You refer particularly to the statements made in a letter dated March 17, 1936, from the General Land Office to Paul M. Niebell, attorney for the Seminole Nation.

The quoted portion of the report of the Secretary of the Interior dated February 2, 1931, beginning with the words "for the purpose of computing the area subdivided by the Geological Survey * * *" is a verbatim copy of an informal memorandum dated May 21, 1930, which was prepared in the General Land Office from the official records at the verbal request of the attorneys representing the Indians and based upon certain assumptions set forth by these attorneys at that time. This unsigned memorandum was not addressed to any one. The General Land Office letter of January 12, 1931, addressed to the Commissioner of Indian Affairs refers to the informal applications of the attorneys for the Indians for information as to the official records of the General Land Office and confirms the fact [fol. 42] that the memorandum of May 21, 1930, was turned over to them.

Neither the unsigned memorandum of May 21, 1930, the above-mentioned letter of January 12, 1931, office letters of June 1 and 19, 1935, addressed to Mr. Niebell, nor the report of the Secretary of the Interior are statements or findings of fact concerning the actual area of the 200,000-acre Seminole Tract by this Department. The memorandum merely furnishes an estimated area based on the assumptions of the attorneys which are not necessarily concurred in by this Department. In fact our investigation of the situation indicates that these assumptions are not valid.

As stated in the memorandum, the Bardwell line as retraced by Hackbusch in 1888 was protracted upon the plats

of the townships between the Canadian and the North Canadian Rivers. The claim that this protracted line is the correct position of the east boundary of the 200,000-acre Seminole Tract is based upon the assumption that the terminal corner on the right bank of the North Fork of the Canadian River in Sec. 25, T. 11 N., R. 6 E., as shown upon the plat approved January 13, 1898, is a correct restoration of the Bardwell terminal post. It must also be assumed in this connection that the record of the Hackbusch retracement which alleged to find only a few Bardwell corners, will correctly define the actual loc-tion of this boundary in relation to the township surveys.

The Creek dividing line as surveyed by Bardwell was never actually connected to the subdivisional surveys at the time the townships were surveyed. Consequently the assumptions made by the attorneys for the Indians upon which the alleged deficiency is based are not sustained by the official record.

In his letter of February 21, 1936, to the General Land Office, Mr. Paul M. Niebell, attorney, called attention to case L-208 in the United States Court of Claims involving a claim of the Seminole Nation for the value of 11,550.54 [fol. 43] acres of its national domain and stated that a memorandum of that office dated May 21, 1930, had been filed in the record of this case. In reply the Assistant Commissioner, by letter dated March 17, 1936, stated:

1. That the information furnished in the memorandum was an estimate based upon a certain protracted position of the dividing line;

2. That the estimated area of the tract under a second assumption which would be equally valid would be considerably larger;

3. That both estimates are subject to the objection that they are based upon the subdivisional surveys executed in 1897-98, many years after Bardwell and Robbins meandered the two forks of the Canadian River, with the possibility of substantial changes in the channels of these streams during the period from 1871 to 1897.

With reference to the four questions listed on page 2 of your letter, the following statements are submitted:

1. The records of the General Land Office do not show that the Robbins survey of the Seminole Tract of 200,000

acres approved February 5, 1872, failed to include 200,000 acres.

2. The records of the General Land Office do not show the actual location of the line run by Bardwell in 1871, from the Canadian River to the north fork in relation to the rectangular system of surveys executed by the Geological Survey in 1897-98. The Bardwell line was not identified and connected to the rectangular subdivisional surveys.

3. The records of the General Land Office show that Henry C. F. Hackbusch in making the survey of the 175,000-acre tract of land purchased by the United States from the Creek Nation under the agreement of February 14, 1881, stated in his field notes that he retraced the Bardwell dividing line, [fol. 44] finding only a few of the Bardwell corners and the alinement quite irregular. There is a conflict between the record of the survey of the Creek Dividing Line by Frederic W. Bardwell in 1871, and the record of the retracement of this line by Henry C. F. Hackbusch in 1888. Both are official records and entitled to the same presumption of correctness. However, the original Bardwell record is consistent with the record of the Robbins survey of the North Fork of the Canadian River projected east from the identified Robbins northwest corner of the Seminole Reservation.

4. The records of the General Land Office do not show that the lands comprising 11,550.54 acres of alleged deficiency have been erroneously omitted from the Robbins survey of the 200,000-acre Seminole Tract. On the contrary, these records show that the area of the tract in question as surveyed by Bardwell and Robbins to be 200,000 acres.

A diagram has been compiled from survey records in this Department, showing the 200,000-acre Seminole Tract as surveyed by Bardwell and Robbins superimposed on the official rectangular system of surveys. Attention is called to the fact that the northwest corner of the tract as established by Robbins was recorded and reestablished by the Geological Survey in 1897. From this corner the Robbins record of the meander of the north fork was projected easterly a distance in departure of 708.02 chains to the Bardwell dividing line and south to the Canadian River. The dividing line and meanders of the Canadian River are shown according to the record of the Bardwell survey of 1871, the

southeast corner of the tract being placed at the distance of 20 miles and 64.43 chains east of the meridian of the mouth of Pond Creek. A blue print of this diagram is enclosed. Certified copies of all correspondence in the case will be sent you as promptly as possible.

Sincerely yours, (Signed) Oscar L. Chapman, Assistant Secretary.

[fol. 45] December 23, 1940.

The Honorable, The Attorney General.

SIR:

In the case of The Seminole Nation v. The United States, No. L-208, Court of Claims, please refer to the letter dated March 26, 1940, in reply to your letter dated February 23 (90-2-20-53), requesting a report on the information that is supplied by the surveying records.

Herewith is a letter dated October 31, 1940, addressed to this Department, from Mr. Paul M. Niebell, Attorney for the Seminole Nation, insisting upon a review of certain points that are set out in the letter of March 26. This has been done, and by letter today I am stating to Mr. Niebell that the doubts can be cleared only by a thorough field examination.

The question which concerns the attitude of the General Land Office is as to the true location on the ground of the Bardwell boundary of 1871, and whether the initial or northeastern corner of the Seminole tract of 200,000 acres, as surveyed by Robbins immediately after the boundary was established, was, as intended, actually in agreement with the Bardwell boundary.

The field-note record of the Robbins survey, approved February 5, 1872, is satisfactory in itself, and leaves no doubt of the inclusion of the full 200,000 acres within the Bardwell and Robbins lines.

The point of the dates of the Bardwell and Robbins surveys is regarded as important. Bardwell began on August 16, 1871; he reached the North Fork of the Canadian River on August 22; he established a marker on the bank of that stream, then continued north on the Creek dividing line. Robbins began his survey on October 23, 1871, commencing at the marker just mentioned. The Robbins field notes call for the Bardwell marker, and there should have been no difficulty as to the identification.

It is presumed that the work of one was familiar to the other; advice and directions for locating the Bardwell [fol. 46] boundary would have been furnished to Robbins, possibly an assistant who knew the line, or a guide; the marks on the trees and the cutting of the undergrowth would be fresh, and readily noticed. The two men were unquestionably in contact during the preparation of their field-note records. The Bardwell field notes were sworn to before a Kansas notary public on January 4, 1872; the Robbins field notes were sworn to before the same notary on the following day.

The retracement of the boundary by Hackbusch, in 1888, is not regarded as conclusive; these field notes do not supply adequate proof of the identification of the boundary.

The position of the Hackbusch line is shown on the township plat, in sec. 25, T. 11 N., R. 6 E.; there is no separate representation of the Bardwell line. It is exceedingly important to note that the Hackbusch location is at the north point of the bend of the river; then, note the first two courses of the Robbins meander line of this bank; (1) N. 53° W., 34.90 chs.; and, (2) S. 84° W., 6.82 chs. The Robbins turning point from the first to the second meander course was evidently very near the Hackbusch point. When this physical condition is taken into consideration, the Robbins initial point, on the Bardwell line, would be placed downstream, or to the southeast, at least the whole length of the first course of the meanders, or an easting of at least 28 chs. from the Hackbusch point.

The Robbins meander courses cannot be laid off from the Hackbusch point, as the courses would lead directly away from the river bank. If Robbins had inadvertently started at a point too far down stream, he could not have failed to note the error when turning at the bend of the river, where Hackbusch placed the Bardwell line, as the Bardwell marks would have been very plain at that time.

The Hackbusch monument on the North Fork of the Canadian River, at the point above mentioned, was placed there on August 25, 1888, at the time of the survey of the 175,000 acre tract, which is situated to the east of the [fol. 47] Creek dividing line. On August 26, Hackbusch began the meanders of the river, running the courses downstream, beginning at the marker which he placed there. The first two courses are recorded as follows: (1) S. 79¼°

E., 6.00 chs.; and, (2) S. 51¾° E., 30.00 chs. These two courses are almost the equivalent of the Robbins first meander course, given above. By Robbins, north 21.00 chs.; and west 27.87 chs.; when reduced to the equivalent northing and westing, running upstream. The first two courses of Hackbusch, south, 19.59 chs.; and east, 29.53 chs.; when similarly reduced, running downstream.

If Hackbusch had noted the impossibility of laying off the Robbins meander courses upstream from the Hackbusch point, and the striking agreement in the position of the river bank downstream, as shown above, it would have been ample warning of the danger of an overlap. This deduction from the field-note record, at the North Fork of the Canadian River, places the west boundary of the Hackbusch 175,000-acre tract to the west of the east boundary of the Robbins 200,000-acre tract a distance of 28 chs., more or less, as nearly as the comparison can be made in this manner.

Another test, readily made, is to compare the recorded field note distance, 20 mi., 64.43 chs., easterly from the mouth of Pond Creek to the meridian of the Bardwell line. The outlet of Pond Creek is in sec. 9, T. 5 N., R. 3 E. The distances along the east and west section lines, as shown on the township plats, give a total of 21 mi., 6.00 chs., to the eastern boundary of T. 5 N., R. 6 E.; by this calculation, the Bardwell boundary would be located 21.57 chs. west of the east boundary of the township at the Canadian River. The east boundaries of Tps. 5 to 11 N., R. 6 E., are along a meridian excepting for an offset, 4.06 chs. to the west, where crossing the standard parallel from T. 8 N., R. 6 E., to T. 9 N., R. 6 E.; by this comparison, the Bardwell boundary would be located 17.51 chs. west of the [fol. 48] east boundary of the township at the North Fork of the Canadian River. This location comes into an intermediate place between the Hackbusch point and what had been shown as the beginning point on the river bank for the Robbins meander courses. In making such comparisons over long distances, some allowances must necessarily be made for minor discrepancies in the directions and lengths of lines.

Before accepting the Hackbusch location the General Land Office recommends that a careful retracement be made based upon the Hackbusch record, including a thorough search for additional marks, if any, along that line. A

similar retracement along the line indicated by the Bardwell field notes is needed also.

By the usual rules the original marks of the Bardwell line will be controlling, so far as such evidence can now be recovered; the Bardwell field-note record courses and distances will govern the restoration of such portions of the line as may not now be marked on the ground, excepting as the method of single proportionate measurement will apply at intermediate mile stations where the marks are now lost.

It is understood that the Seminole case was set for trial on a recent date, but that a short extension was granted on motion by Mr. Niebell in order to afford the time for a review of the surveying records. The additional question follows as to whether or not the parties to the suit may elect to request a further extension so as to allow the time for a thorough field examination.

In his current letter Mr. Niebell complains that the reference in the letter of March 26 to the Paine memorandum "implies that the conclusions contained therein were directed by the attorneys." No such construction was intended. On that point, it is evident that Mr. Paine was well aware of the incompleteness of the Hackbusch field notes, their questionable value as proof of the location of the Bardwell boundary, and consequent doubt as to whether or not Hackbusch might have been the one in error, rather than Robbins.

The explanations in the letter of March 26, were intended [fol. 49] to make these point- clear; the further review shows the necessity for that caution.

Very truly yours, (S.) E. K. Burlew, First Assistant Secretary.

[fol. 50] EXTRACTS FROM HACKBUSCH FIELD NOTES

July 31, 1888

"Begin at the initial monument on the Creek Dividing Line and left bank of Canadian River, which is a cedar post 6 ins. square, set firmly in, and 4½ ft. above ground, marked: Seminole on west and Creek on east faces, from which

"A post oak, 24 ins. diam., bears S. 86½° E., 43 lks. dist., marked thus: X

A post oak, 16 ins. diam., bears S. 48° W., 56 lks. dist., marked thus: X"

"In extending this line 4 miles north and making diligent search in all directions, I was unable to find any trace of corners and of a surveyed line.

"At a distance of 3 miles 68.70 chs., and 16.15 chs. east of this line, Thomas Factor, my guide, showed me the place, where the Bardwell 4th mile corner had been established. The post for corner is missing, but the bearing trees are standing, and agree with the original field notes, or as near as old bearing trees generally do agree, making due allowance for error, and difference in instruments and variations.

"At the point indicated by the bearing trees, I made search for remains of old post, and found small pieces of an oak post on the side of the hole where the same had been planted.

From this point the two bearing trees bear as follows, viz:

"A post oak, 12 ins. diam., bears N. 60° W., 60 lks. dist.
A post oak, 30 ins. diam., bears S. 27½° E., 30 lks. dist.

"Mr. Bardwell, in taking these bearing trees, did not set off any variation, or allow for any, on his instrument."

August 1, 1888

"I now run a blank line from the Bardwell 4th mile corner to the initial point on the Canadian River.

"S. 2° W., on a blank line. Va. 9° 30′ E.
At 3 miles and 68.70 chs. to initial monument.
I found no blazed line nor corners.

"I am satisfied that the cedar post on the north bank of the Canadian, marked Seminole on west and Creek on east faces, is the initial point of the Creek Dividing Line, and [fol. 51] established by Mr. Bardwell. The statement of Thomas Factor and another Seminole, who were present at the time when Mr. Bardwell set the corner, which Gov. Brown corroborates, is sufficient proof. Further, the cedar post shows that it has been there fully 15 or 16 years. The description of the same and that of the bearing trees, together with the marking, agree with the Bardwell field notes."

August 2, 1888

"This 4th mile falls short 11.30 chs. of being 80 chs. or a full mile. I am satisfied that no line was ever surveyed and measured from the initial to the 4th mile corner, and by what means it was established is an enigma to me."

August 16, 1888

"The 40th mile corner is a Post Oak, 12 ins. diam., marked (with a common knife) XL M on west face, from which

"A black oak, 12 ins. diam., bears N. 86° E., 70 lks. dist.
A dead post oak, 6 ins. diam., bears S. 16½° E., 50 lks. dist.
A post oak, 10 ins. diam., bears N. 46° E. 124 lks. dist.
All trees are marked alike, with a cross, thus: X.

"No magnetic variation was allowed. The bearing trees do not exactly agree with the field notes, but come as near to it as Mr. Bardwell's survey generally comes of being correct."

August 17, 1888

"South, on 39th mile. Va. 8° 50′ E.
"79.40 chains: To a point 520 lks. west of an old oak post, 4 ins., square, marked XXXVIII M. (The marking is done with a common knife) from which

"A post oak, 18 ins. diam., bears S. 17½° W., 99 lks. dist., marked with a cross (X).
A post oak, 11 ins. diam., bears N. 84½° E., 60 lks. dist., marked thus: X.
A post oak, 13 ins. diam., bears N. 23° W., 20 lks. dist., marked with a cross, thus: X.
"This being the 38th mile corner."

"There is a discrepancy of 54.55 chs. in the Bardwell measurement between the 4th and 38th mile corner."

[fol. 52] August 25, 1888

"The old line (run by Bardwell) is very poorly surveyed, if it ever was surveyed. It is my opinion, the country being very rough and very difficult to travel over, that the old Rankin line was used as an auxiliary to establish an occasional corner between the two rivers. It is evident that no

line was blazed and marked. This is verified by the statements of Gov. J. F. Brown, Thomas Factor, Daly David, and John Stepny. The two latter are old Seminole Negroes of more than ordinary intelligence, and told me that no corners were ever found on the Bardwell line between the 4th mile corner and North Fork of Canadian by anyone. The Bardwell survey through the Seminole lands seems to be considerable of a myth."

* * * * * * *

From the initial monument of Creek Dividing Line on the north bank of the Canadian River, I run North 2° E. along the 1st mile.

Va. by Burts improved Solar Compass 9° E. (Chains) Leave first bottom, & enter second, bears 9.70 E. and W.

* * * * * * *

[fol. 53-54] EXTRACT FROM A LETTER OF ACTING ASSISTANT COMMISSIONER OF THE GENERAL LAND OFFICE TO THE COMMISSIONER OF INDIAN AFFAIRS, DATED JANUARY 12, 1931

"In reply to your letter (L-O&G, 31152-1930) dated January 5, 1931, you are advised that upon informal applications by the attorneys representing the Seminole and Creek Indians for certain information, there were turned over to them certain informal memoranda quoted in your letter as the result of investigation of the official records (1) relating to the areas actually included in the 200,000-acre tract granted to the Seminoles for a reserve by the act of March 21, 1866 (14 Stat., 755), and the additional 175,000-acre tract purchased from the Creeks for the Seminoles adjoining the east side of the 200,000-acre tract, under these provisions of the act of March 3, 1873 (17 Stat., 626): * * *

"The data upon which the memoranda were based have been reviewed, and the conclusions contained therein are hereby confirmed as follows:

"Memorandum dated May 21, 1930:

"Seminole Tracts:

"For the purpose of computing the area subdivided by the Geological Survey of the lands in the two portions constituting the Seminole Lands, the terminal corner of the

Creek Dividing Line on the south or right bank of the North Fork of the Canadian River was used as a point of control, from which the Bardwell line as retraced by Hackbusch in 1888 was laid down to the north or left bank of the Canadian River. This covers a distance of 34 miles 37.70 chs., and from this division line as thus defined, it is found that west thereof, there were actually included in the 200,000-acre tract 188,449.46 a. or a deficiency of 11,550.54 a. East of said line there were actually included in the 175,000-acre tract 177,397.71 a., or an excess of 2,397.71 a., leaving a net deficiency in the two tracts of 9,152.83 a."

AGREEMENT OF COUNSEL AS TO RECORD

Agreed to: December 8, 1941.

Paul M. Niebell, Attorney of Record for Plaintiff.

Norman M. Littell, Assistant Attorney General for Department.

R. T. N.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument immediately following No. 348. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.